Supreme Court, U.S.
FILED
FEB 3 - 2011
OFFICE OF THE CLERK

No. 10-573

In the
Supreme Court of the United States

SHEPHERD MONTESSORI CENTER MILAN,
Petitioner,

v.

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, AND ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR REHEARING

ROBERT CHARLES DAVIS
ATTORNEY AT LAW
10 S. MAIN ST., SUITE 401
MT. CLEMENS, MI 48043
(586) 469-4300
rdavis@davislistman.com

Co-Counsel for Petitioner

ROBERT L. BUNTING
Counsel of Record
ATTORNEY AT LAW
P.O. BOX 7
OXFORD, MI 48371
(248) 628-5150
lciseadog@yahoo.com

Counsel for Petitioner

February 3, 2011

Becker Gallagher · Cincinnati, OH · Washington, D C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

LAW AND ARGUMENT 1

CONCLUSION 10

CERTIFICATION

TABLE OF AUTHORITIES

CASES

City of Cleburne, Tex. v. Cleburne Living Center,
473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313
(U.S.Tex.,1985) 1-5, 10, 11

Johnson v. Bredesen,
624 F.3d 742
(C.A.6 (Tenn.), Oct. 28, 2010) 1-8, 10

Mathews v. Lucas,
427 U.S. 495, 96 S.Ct. 2755 (U.S.R.I.,1976) . . 11

COURT RULES

Sup. Ct. R. 44 1

OTHER AUTHORITIES

U.S. Constitution,
14th Amendment 1, 2, 3, 10, 11

INTRODUCTION

The Michigan Supreme Court erred when it ruled that the Defendants Ann Arbor Charter Township, Ann Arbor Charter Township Zoning Official, and Ann Arbor Charter Township Zoning Board of Appeals, ("Defendants") did not violate the Equal Protection Guarantee of the Fourteenth Amendment to the United States Constitution in direct conflict with this United States Supreme Court's Opinion in *City of Cleburne v. Cleburne Living Ctr, Inc.*, 473 US 432, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985) thereby destroying Equal Protection in the State of Michigan. Left unchecked, local governments in Michigan are free to create artificial zoning categories at the expense of Equal Protection. This is alarming and requires a correction.

LAW AND ARGUMENT

Pursuant to Rule 44, a petition for rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. (**Rule 44**) On January 10, 2011, this Court issued an Order denying the Petitioner, Shepherd Montessori Center Milan's ("Petitioner"), Petition for A Writ of Certiorari. The Petitioner now timely seeks this Petition for Rehearing.

Here, the Petitioner's Petition for A Writ of Certiorari was mailed to this Court on October 28, 2010. On December 17, 2010, the United States Court of Appeals for the Sixth Circuit denied rehearing en banc related to an Opinion in *Johnson v. Bredesen*, 624 F.3d 742, 755 (C.A.6 (Tenn.), Oct. 28, 2010). The issues presented in *Johnson* demonstrates the further

erosion of *Cleburne* and illuminate the importance of this United States Supreme Court granting the instant Petition for Writ of Certiorari.

In *Johnson*, the United States Court of Appeals for the Sixth Circuit was presented with the issue of whether the Equal Protection Guarantee of the Fourteenth Amendment to the United States Constitution is violated when the franchise to vote is restored to those felons who can afford to pay their child support but not restored to those felons who cannot afford to pay their child support. Specifically, the *Johnson* plaintiffs argued that Tennessee's voter re-enfranchisement statute violates the Equal Protection Clause of the Constitution because the statute improperly conditioned the restoration of their voting rights on their ability to pay restitution and child support obligations.

> "Plaintiffs Terrence Johnson, Jim Harris, and Joshua Roberts [FN1]-all Tennessee residents and convicted felons-filed a complaint alleging that, by conditioning **restoration of their voting rights on payment of court-ordered victim restitution and child support obligations, Tennessee's voter re-enfranchisement statute violates the Equal Protection Clause of the United States Constitution**, the Twenty-Fourth Amendment, and the Ex Post Facto and Privileges*745 or Immunities Clauses of the United States and Tennessee Constitutions. In a well-reasoned decision, the district court granted Defendants' motion for judgment on the pleadings, and Plaintiffs appealed. Finding no error, we affirm."

(*Johnson v. Bredesen*, 624 F.3d 742, 744 -745 (C.A.6 (Tenn.),2010).) (Emphasis Added)

The Sixth Circuit found no violation of Equal Protection. However, Judge Moore issued a well-reasoned and lengthy dissent which, just like the Petitioner herein, cites extensively to this United States Supreme Court's Opinion in *Cleburne*. Specifically, Judge Moore cites to *Cleburne* and states aptly that the Equal Protection Clause is satisfied as long as there is a plausible policy reason for the classification and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary. In particular, Judge Moore cites to this United States Supreme Court's ruling in *Cleburne* where this United States Supreme Court ruled that the state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.

> "[T]he Equal Protection Clause is satisfied as long as there is a plausible policy reason for the classification ... and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (internal citations omitted); *see* ***City of Cleburne, Tex. v. Cleburne Living*** *Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ("**The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational**."). (*Johnson* v. Bredesen 624 F.3d 742, 755 (C.A.6

(Tenn.),2010).) (Judge Moore Dissent) (Emphasis Added)

Judge Moore further cites to that portion of *Cleburne* wherein this United States Supreme Court notes that it has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available. This certainly applies to the position of the Petitioner.

> "Moreover, "[t]he Supreme Court, employing rational basis review, has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." *Craigmiles*, 312 F.3d at 227 (citing ***City of Cleburne***, 473 U.S. at 449, 105 S.Ct. 3249)." (*Johnson v. Bredesen*, 624 F.3d 742, 757 (C.A.6 (Tenn.),2010).) (Judge Moore Dissent)

Judge Moore states that, because the Tennessee's voter re-enfranchisement statute neither burdens a fundamental right nor discriminates against a suspect class, the plaintiffs bear the burden to show that it bears no rational relationship to any legitimate government end.

> "Given these two conclusions, I must also agree that, because the Tennessee provisions neither burden a fundamental right nor discriminate against a suspect class, the Plaintiffs bear the burden to show that § 40-29-202(b) and (c) **bear no rational relationship to any legitimate government end**. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)." (*Johnson v.* Bredesen, 624 F.3d 742, 755 (C.A.6

(Tenn.),2010).) (Judge Moore Dissent) (Emphasis Added)

Judge Moore, citing to this United States Supreme Court's ruling in *Cleburne,* finds that she cannot agree that the provision restoring franchise to vote to those felons who can afford to pay their child support is rationally related to a legitimate government objective.

> "In short, I find entirely unconvincing the majority's conclusion that § 40-29-202(b) and (c) constitute a rational way to encourage Tennessee's legitimate interest in the collection of outstanding financial obligations or encourage compliance with court orders imposing such obligations. The attempt to incentivize payments that an individual is simply incapable of making by linking those payments to the right to vote, particularly when there are other *758 **collection methods available, advances no purpose and embodies nothing more than an attempt to exercise unbridled power over a clearly powerless group, which is not a legitimate state interest.** ***See City of Cleburne,*** **473 U.S. at 446-47, 105 S.Ct. 3249**." (*Johnson v. Bredesen,* 624 F.3d 742, 757 -758 (C.A.6 (Tenn.),2010) (Judge Moore Dissent) (Emphasis Added)

* * *

> "I cannot agree that the provision restoring the franchise to only those felons who are affluent enough to satisfy their child-support arrears is rationally related to a legitimate government objective, and I believe that no policy reason

> supports the distinction in the instant case." (*Johnson v. Bredesen*, 624 F.3d 742, 756 (C.A.6 (Tenn.),2010).) (Judge Moore Dissent) (Emphasis Added)

Judge Moore then aptly states that, in light of the absence of any rational purpose for the disparate treatment sanctioned, she would hold that the provision requiring the payment of child support in order to get suffrage back does not pass constitutional scrutiny because of the absence of any rational purpose for the disparate treatment.

> "In conducting a rational-basis inquiry, we "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. at 216, 102 S.Ct. 2382. However, **"[r]ational basis review, while deferential, is not 'toothless.'"** *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir.1998) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976)). **In light of the absence of any rational purpose for the disparate treatment sanctioned by § 40-29-202(b) and (c),** as well as this United States Supreme Court's reluctance to deem rational state-imposed qualifications drawn along economic lines that inhibit the exercise of any right over which the state has a monopoly, **I would hold that the provision requiring payment of child support and restitution prior to the restoration of suffrage, regardless of an individual's ability to pay, cannot withstand constitutional scrutiny. . . .**

> The district court erred in granting judgment on the pleadings with regard to this claim, and I must respectfully dissent from the **majority's resolution of the Plaintiffs' Equal Protection Clause challenge**." (*Johnson v. Bredesen*, 624 F.3d 742, 765 - 766 (C.A.6 (Tenn.),2010).) (Judge Moore Dissent) (Emphasis Added)

Here, just like Judge Moore noted in *Johnson*, the Record is devoid of any rational purpose for the disparate treatment being imposed on the Petitioner. In the instant matter, the Record before the Michigan Supreme Court demonstrated that the Petitioner's proposed use of the same Property as a prior and permitted user was for the (faith based) education of 25 young children and would not create any different traffic concerns because the existing parking is sufficient.

> "11. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any traffic concerns related to the "**variance request**."
>
> **ANSWER: . . .Defendants admit that there was no discussion at the hearing on plaintiff's variance request regarding *excessive motor vehicle traffic or like problems*." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added)** (Pet. App. U at 232a-233a)
>
> "8. Please admit that the Defendants made no finding on the record at the "**variance**

> **hearing**" indicating any parking concern related to the "**variance request**."
>
> **ANSWER: . . . Defendants admit that the issue of motor vehicle *parking* was not discussed during the hearing on plaintiff's variance application." (Defendants Response to Request to Admit dated May 17, 2005)** (Pet. App. U at 232a)

Here, the Record before the Michigan Supreme Court was clear that the Petitioner's proposed use has no demonstrated health, safety or sanitation concerns different from the prior use of Rainbow Rascals.

> 12. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***sewage*** concern related to the "**variance request**."
>
> **ANSWER: Defendants admit that there was no discussion of *sewage* at the hearing on plaintiff's variance request.**
>
> 13. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***fire*** concern related to the "**variance request**."
>
> **ANSWER: Defendants admit that there was no discussion of any *fire* concern at the hearing on plaintiff's variance request." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added)** (Pet. App. U at 233a)

Nowhere in the Record before the Michigan Supreme Court was there one scintilla of evidence indicating that the use desired by the Petitioner poses a public health concern different from the prior use by Rainbow Rascals.

> "10. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***public health concern*** related to the "**variance request.**"
>
> **ANSWER: Defendants admit that there was no discussion of *public health concerns* at the hearing on plaintiff's variance." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added)** (Pet. App. U at 232a)

The Record before the Michigan Supreme Court provided no indication of any articulated concern or reason for denying the Petitioner's proposed Property use. There was no Record evidence of a rational purpose for the Defendants disparate treatment of the Petitioner. The Record before the Michigan Supreme Court is clear that the Property use requested by the Petitioner had no alleged or demonstrated detrimental impact on the land, environment, water, sanitation, traffic or any other aesthetic concern. (Pet. App. U, 228a-244a)

There is no dispute here that the Petitioner and the prior approved user, Rainbow Rascals, were similarly situated in all relevant respects. There is even less dispute that the governmental decision makers treated the Petitioner and Rainbow Rascals entirely differently. The difference in treatment cannot be

more drastic. The Petitioner was absolutely prohibited from using the Property for 25 children and Rainbow Rascals was absolutely allowed to use the exact same Property for 100 children. Just as in *Cleburne*, the Record is clear that there is no rational reason for treating the Petitioner's proposed use differently. In conflict with *Cleburne*, the Michigan Supreme Court ruled that the Petitioner was not treated differently from a similarly situated entity despite the fact that the Record did not reveal that the Petitioner's proposed use threatened any legitimate interest of the Defendants in a way that Rainbow Rascals previously permitted use would not. The Michigan Supreme Court has rejected *Cleburne* and eroded Equal Protection in Michigan.

Alarmingly, however, the current erosion of *Cleburne* and of Equal Protection does not end in Michigan. As noted above, the United States Court of Appeals for the Sixth Circuit's recent ruling in *Johnson* demonstrates a further erosion of *Cleburne* and of Equal Protection.

CONCLUSION

The Michigan Supreme Court's published Opinion affects every citizen in the great State of Michigan. The Michigan Supreme Court's Opinion allows the State, local governments and related State agencies to treat similarly situated entities differently based solely on the lines drawn in the zoning ordinances which often are riddled with biases, prejudices and unsupported wishes of local officials.

The Michigan Supreme Court's ruling directly conflicts with *Cleburne* and blesses local governments

with impunity to make any arbitrary classification they choose for the uses of properties. Local governments are free to make any classification they choose without any fear of violating Equal Protection.

Without this United States Supreme Court's intervention, municipalities in Michigan are free to treat similarly situated entities differently without any evidence of a rational reason for the disparate treatment in direct contravention of *Cleburne*. This is not what the framers of the 14th Amendment intended. From henceforth, municipalities in Michigan can choose to treat similarly situated entities differently without any fear of violating Equal Protection. Today, a Montessori school was treated disparately without any reason stated on the record for the disparate treatment. Tomorrow, a Catholic school may seek to use a location previously used by a Lutheran school and the municipality will be free to say no without the need to show any rational reason for the disparate treatment. This is wrong and an insult to the Fourteenth Amendment.

As this Court ruled long ago, the rational basis test may be deferential but it is not toothless.

> "**Finally, while the scrutiny by which their showing is to be judged is not a toothless one,** E. g., Jimenez v. Weinberger, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974);" (*Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755, 2764 (U.S.R.I.,1976).)

The Michigan Supreme Court's ruling is a klaxon sounding loudly and warning of the erosion of *Cleburne*.

For the reasons stated above, the Petitioner respectfully requests that this United States Supreme Court grant the Petition for Rehearing and grant Petitioner its previously submitted Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT L. BUNTING
Counsel of Record for Petitioner
Shepherd Montessori Center, Milan
P.O. Box 7
Oxford, MI 48371
Telephone (248) 628-5150
lciseadog@yahoo.com

Robert Charles Davis
Co-Counsel for Petitioner
Shepherd Montessori Center Milan
10 S. Main St., Suite 401
Mt. Clemens, MI 48043
Telephone (586) 469-4300
Facsimile (586) 469-4303
rdavis@davislistman.com

CERTIFICATION UNDER RULE 44

Attorney Robert L. Bunting certifies that pursuant to Rule 44, the grounds for this Petition for Rehearing are restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented in the Petition for Writ of Certiorari and that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

Robert L Bunting /ac

ROBERT L. BUNTING
Counsel of Record for Petitioner
Shepherd Montessori Center, Milan
P.O. Box 7
Oxford, MI 48371
Telephone (248) 628-5150